

**U.S. Department of Labor**

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Issue date: 22Mar2001

**CASE NO.: 2000-LHC-1290**

**OWCP NO.: 02-118659**

**IN THE MATTER OF**

**JOHN W. KNEBEL**  
**Claimant**

**VS.**

**GENERAL DYNAMICS LAND SYSTEMS,**  
**Employer**

**TRAVELERS INSURANCE COMPANY**  
**Carrier**

**APPEARANCES:**

Gary B. Pitts, Esq.  
For Claimant

Robert E. Thomas, Esq.  
For Employer/Carrier

**BEFORE: C. RICHARD AVERY**  
Administrative Law Judge

### **DECISION AND ORDER**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), as extended by the Defense Base Act, 42 U.S.C. §1651. This claim is brought by John W. Knebel (Claimant)

against General Dynamics Land Systems (Employer) and Traveler's Insurance Company (Carrier). The formal hearing was conducted at Houston, Texas on October 23, 2000. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.<sup>1</sup> The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-46, 55-81, 83-99 and Employer's Exhibits 1-19.<sup>2</sup> This decision is based on the entire record.<sup>3</sup>

### **Stipulations**

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. Fact of injury is disputed. It is undisputed that Claimant was assigned to work in Saudi Arabia and/or Iraq between October 4, 1990 and April 30, 1991 working on the Fox chemical detection vehicle, and that the claim is properly under the Defense Base Act;

2. Fact of injury/accident is disputed;

3. Claimant maintains that toxic exposures and traumatic occurrences during the Gulf War and duty in Saudi Arabia and/or Iraq between October 4, 1990 and April 30, 1991, caused or contributed to Claimant's alleged disability. This is disputed by Employer/Carrier;

4. An employer/employee relationship existed between September 18, 1990 and April 30, 1991, but alleged injury on-the-job is disputed;

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<sup>1</sup>The parties were granted time post hearing to file briefs. This time was extended up to and through January 10, 2001.

<sup>2</sup>Claimant's Exhibit 5 and Employer's Exhibits 17-19 were submitted post hearing.

<sup>3</sup> The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. \_\_, lines \_\_"; Joint Exhibit- "JX \_\_, pg.\_\_"; Employer's Exhibit- "EX \_\_, pg.\_\_"; and Claimant's Exhibit- "CX \_\_, pg.\_\_".

5. It is disputed that the alleged injury arose in the course and within the scope of employment;

6. Employer was notified of the alleged injury on May 24, 1996;

7. Notification of the alleged injury pursuant to Section 12 of the Act to Employer was May 24, 1996 and to the Secretary of Labor was April 18, 1996, with the filing of an LS-203;

8. Notice of Controversion was filed October 30, 1996;

9. No informal conference was held;

10. It is disputed that disability resulted from the alleged injury;

11. No medical benefits under Section 7 of the Act have been paid;

12. No compensation has been paid;

13. Claimant maintains his average weekly wage is \$960.45. This is disputed by Employer/Carrier;

14. Claimant maintains he reached maximum medical improvement on August 31, 1996. This is disputed by Employer/Carrier; and

15. Claimant earned the following amounts after the Gulf War: balance of 1991- \$140; 1992-\$17,340; 1993- \$11,495; 1994- \$15,663; 1995- about \$25,838; 1996- about \$18,500. Claimant has not worked since the end of August 1996;

### **Unresolved Issues**

The unresolved issues in this case are:

1. Timely notice and filing;

2. Fact of injury in the course and scope of employment in Saudi Arabia and/or Iraq;

3. Nature and extent of disability and loss of wage earning capacity;
4. Average weekly wage; and
5. Attorney's fees and expenses (to be submitted if benefits are awarded to Claimant).

## **Statement of the Evidence**

### Testimonial and Non Medical Evidence

Claimant testified during trial.<sup>4</sup> He is 47 years old and grew up in Chicago, Illinois. He completed high school, worked for F.W. Woolworth, and enlisted in the Army in 1972. Claimant served in the Army for thirteen years and eight days. Claimant worked first as a field artillery crewman and then in forward observing and gun sections. In 1978 the Army reclassified Claimant into supply and logistics because of a tarsal tunnel injury he had sustained.

Claimant sustained a tarsal tunnel injury when he and four other men made a parachute infiltration into Rainier National Forest for reconnaissance of a power station. Upon landing, they fell into a sink hole and Claimant inverted his left foot, stretching all of the muscles and nerves in his foot. Claimant primarily injured his left ankle. Claimant was reclassified after this injury because he was unable to perform the constant squatting and bending of his toes to maneuver and look through gun sights.

Claimant remained in the Army until 1985.<sup>5</sup> In 1981, he received the Belgian Parachutist badge and he also received letters of commendation from his Airborne battalion commander.<sup>6</sup> In 1984, Claimant earned the Army Achievement Medal.

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<sup>4</sup>Employer's Exhibit 11 is Claimant's deposition.

<sup>5</sup>See Claimant's Exhibit 1, Claimant's professional, and educational awards and achievements before the Gulf War. *See also* Claimant's Exhibit 3, an award for The Outstanding Civilian Service Medal from the Department of the Army for his maintenance on the Fox vehicle during the Gulf War.

<sup>6</sup>His Belgian parachutist badge was awarded three years after his tarsal tunnel injury.

Claimant also took the advanced non-commissioned officer's course in 1985. Claimant left the military because he tested positive for marijuana use. His rank at the time of his discharge was staff sergeant for mobile.<sup>7</sup>

After the Army, Claimant was employed by Dyna Electron Corporation, a company with a Department of Defense contract. Claimant, as an artillery mechanic, worked with the maritime preposition ship program all over the world, specifically in the Indian Ocean.

Claimant worked for Employer as an artillery mechanic.<sup>8</sup> Claimant was sent to the Persian Gulf on a short-term foreign assignment as a civilian automotive repairman on the Fox vehicle in October 1990. Claimant was trained on this vehicle in Kassel, Germany.<sup>9</sup> The Fox Nuclear Biological Chemical Reconnaissance System was a six-wheeled light armored car with a mobile mass spectrometer for chemical detection.<sup>10</sup> Claimant was responsible for maintaining and repairing six Fox vehicles during Desert Shield/Desert Storm.

Prior to the Fox vehicle, chemical identification was more dangerous. An individual stepped out of the vehicle and dipped litmus paper into the chemical or supposed chemical. When the detection paper turned a certain color the chemical was identified. Utilization of the Fox vehicle made it possible for no individual to physically leave the vehicle to test for chemicals. The vehicle sniffed and probed the ground, sucking in chemical vapors. These vapors went into a vacuum which fed into a computer. The computer then analyzed the substance and identified the

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<sup>7</sup>See Claimant's Exhibit 79, a DD-214, Claimant's release from active duty. Included were notations of various medals and awards Claimant received while in the military.

<sup>8</sup>See Employer's Exhibit 14, extracts from Claimant's personnel file. *See also* Claimant's Exhibit 78, a letter from the president and CEO of General Dynamics, written in March 1991, thanking Claimant for his hard work and dedication. *See also* Claimant's Exhibit 80, a letter of commendation from Mansour-General Dynamics LTD to Claimant, dated August 1, 1991, thanking Claimant for his "can do" attitude and hard work during his exposure to severe environmental conditions during the Gulf War.

<sup>9</sup>Claimant received a certificate of competence for the NBC Reconnaissance System Fox-Operation and Automotive Maintenance Training in 1990.

<sup>10</sup>See Claimant's Exhibit 72 for a picture and description of the Fox vehicle.

chemical. The individuals inside the Fox vehicle could easily retrieve samples for further analysis by placing their hands through rubber gloves attached to the vehicle.

Claimant's health was excellent prior to and during the Gulf War, except for his previous tarsal tunnel injury in his left ankle and a high frequency hearing loss.<sup>11</sup> Prior to leaving for the war, Claimant enjoyed sport parachuting, bouchee ball, and frisbee playing. Prior to the war, Claimant did not have problems with the following: peripheral neuropathy, numbness in hands and legs, skin lesions, chronic fatigue, chronic joint pain, sleep disorder, chronic depression, chronic anxiety, confusion, disorientation, chronic irritability, short-term memory problems, difficulty concentrating, chronic moodiness, chronic anger, major dental problems, chest pain, significant unintended weight loss, chronic headaches, chronic diarrhea, chronic urinary incontinence, blurred vision, occasional dizziness and loss of balance.

Claimant arrived in the Persian Gulf on October 4, 1990.<sup>12</sup> Claimant arrived after the Kuwait invasion of August 2, 1990. For the first month, Claimant was stationed in Dhahran. As more units came overseas, Claimant, as a civilian employee, was assigned to the Third Infantry Division Recon, a chemical reconnaissance unit. He went to the King Fahad Air Base and lived with the troops.<sup>13</sup> After Christmas, Claimant and the unit performed a maneuver that led them through Raffa, on the Iraqi/Saudi border. Claimant was present on this border during the air war that began on January 16, 1991.

After the air war began, Claimant heard many chemical alarms sounding. The morning of January 17, 1991, war was declared and the main attacks began on Baghdad. The next night, Claimant went from that location to Dahman to pick up spare parts and mail. As he was leaving, the alarm sirens went off and the lights in the city went out. He next heard the fire of Patriot missiles from the air base at Dhahran. Patriot missiles intercepted SCUD missiles coming into the city and exploded right above Claimant's head. Claimant put on his Mission Oriented

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<sup>11</sup>See Claimant's Exhibit 2, Employer's pre-employment physical of Claimant, dated September 11, 1990.

<sup>12</sup>See Claimant's Exhibit 70, Claimant's passport showing the date of entering and leaving Saudi Arabia.

<sup>13</sup>King Faad Air Base is a few hundred miles from the Saudi/Iraqi border.

Protective Posture (MOPP) suit and gas mask because the fallout from the SCUDs and Patriots was intense. Claimant stayed by the walled perimeter and continued to wear his MOPP suit for about one hour. Claimant then took off his gas mask and drove back to Dahman, near the border, where he experienced another SCUD attack. Claimant experienced additional SCUD attacks in Dhahran, Hafabatan and King Kaleb Military City (KKMC) near the town of Haflabadi.

Claimant often heard chemical alarms. On one instance, Claimant was present at King Fahad Air Base during the afternoon when the alarms went off. He saw yellow smoke when Patriots were launched, indicating a chemical attack. Claimant was around the Fox detection vehicle when it made findings of chemical warfare agents during the war. One night the Fox vehicle was deployed near Dhahran and detected a chemical on a highway road leading into the city around the airbase.<sup>14</sup>

Claimant did not sleep in the Fox vehicle because he was a mechanic. Instead, he slept in a German Army Man Truck, GMC pickup truck or Toyota Land Cruiser pickup truck. The only vehicles to contain over-pressure to keep out chemical agents was the Fox vehicle and M-1 tank. Claimant was issued one MOPP suit and extra filters for his gas mask by the U.S. military during his entire tenure.

While Claimant was in Iraq, he came across many dead animals. He observed raw flesh without the presence of flies or bugs. Claimant linked the condition of the animals to the presence of chemical or biological agents. When he was still in Saudi Arabia, prior to crossing the border, Claimant observed flies everywhere, but as he traveled into Iraq, he observed dead animals and the absence of flies and gnats.

Claimant explained that prior to the time of the war, there was a big bug problem with tiny mosquitos. He was given mosquito netting, but the bugs continued to penetrate the netting and bite him. Claimant also was bitten by sand flies. The military sprayed the surrounding areas with chemicals to lessen the effect

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<sup>14</sup>During the beginning of the air war, Claimant occasionally went to KKMC to pick up parts and mail. Claimant testified there were French detections of low-level nerve gas and mustard gas found near KKMC during this time period.

of the bugs. Claimant also used the personal bug spray, provided by the Army, a couple of times a week to combat the mosquitos. Claimant explained that this insecticide occasionally tingled, something he had not experienced previously. The military also sprayed chemicals on the roads to minimize the dust from dust storms.

Claimant ate the local food. When Claimant first arrived in the Middle East until December, the temperature was about 125 degrees. In January and February, the temperature cooled off during the day and became very cold at night. For the first three weeks when Claimant arrived, he stayed in a hotel. After that, Claimant lived in his tent and truck. While living in the tents, Claimant was exposed to kerosine heater fumes. The only ventilation for the tent was through one door. Claimant shared the tent with four or five other men. Claimant was also present during the burning of human waste that occurred every few days. Sometimes Claimant inhaled that smoke. Prior to going over to the Middle East, Claimant received a tetanus shot and gamma globulin shot for hepatitis or cholera.

Claimant experienced stress during the SCUD missile explosions. A lot of the men were hesitant in removing their MOPP suits when given the “all clear,” because they questioned whether it was truly safe to remove the protective gear. Claimant was scared, but did not leave the area because he felt a sense of loyalty to the troops. Claimant explained that wearing the MOPP suit was akin to walking into a sauna.

Even though Claimant had previously been in the military, he still experienced stress during combat in the Gulf. Claimant was an eyewitness, with the 82<sup>nd</sup> Airborne, to the dropping of cluster bombs. Claimant explained that once the “main thing” opened up in the cluster bomb, many bombs the size of his fist were dropped. These small bombs could easily blow off an arm or leg. He was instructed not to leave his vehicle while in Iraq because these cluster bombs were everywhere. During the war, Claimant ended up about 190 miles into Iraq. He personally witnessed soldiers being killed. Claimant detailed one instance when he was 150 yards away from a truck and saw men firing their weapons, resulting in flying body parts.



Claimant was given pyredostigmine bromide (PB) anti-nerve gas pills by the military and ingested these pills as instructed, one every eight hours.<sup>15</sup> He was told by the military that these pills would help him with infection from nerve agents. He continued to ingest these pills until he left Iraq, in March 1991. Claimant was let go by Employer on April 30, 1991, due to a reduction in force.<sup>16</sup>

Claimant received an outstanding evaluation for his work performance from January 1, 1991 through March 1, 1991.<sup>17</sup> Claimant remembered receiving a high rating for his work during the war. Claimant testified that there was nothing “sinister” in the records showing anything other than he had been a good employee.

Claimant inspected Claimant’s Exhibit 12, a map the Department of Defense published regarding the location of the plume nerve gas from Khamisiyah. Claimant explained that he was within the area of the plume, as evidenced by Claimant’s Exhibit 74, a map of where Claimant was actually located in relation to Khamisiyah.

After the Gulf War, Claimant suffered from many of the symptoms previously stated. His worst problem has been chronic fatigue syndrome.<sup>18</sup> He explained that he has difficulty sleeping and endures night sweats. By the morning, he does not feel rested and little tasks, such as putting on his shoes or using the bathroom, has become a chore. Claimant never felt this way prior to the war. This problem has gotten worse over time.

Claimant also experiences numbness in both hands and both legs.<sup>19</sup> The numbness extends from his legs to include his ankles and testicles. This problem has worsened. It began around 1994 and 1995. By 1996, Claimant’s lower half of

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<sup>15</sup>See Claimant’s Exhibit 75, a half-used packet of the PB pills and Claimant’s Department of Defense civilian driver’s license.

<sup>16</sup>See Claimant’s Exhibit 99, Employer/Carrier’s answers to interrogatories.

<sup>17</sup>See Claimant’s Exhibit 73.

<sup>18</sup>Claimant began to experience chronic fatigue syndrome a few months upon his return to the States.

<sup>19</sup>Claimant can no longer function as a mechanic because he does not have the necessary dexterity to work with tools.

his body would go completely numb. This problem interferes with his daily life, as well as his employment. Claimant stopped working in August 1996 as an automobile reposessor because, as Claimant drove in traffic, various body parts went numb, making it difficult, if not impossible, to apply the brakes of the car.<sup>20</sup>

In addition to the chronic fatigue and numbness, Claimant also experiences throbbing joint pain from his waist down, chronic headaches, chronic sleep disorder, and lesions, cuts and boils on his back, legs and hands.<sup>21</sup> Claimant believes that he received these lesions on his back because he worked underneath vehicles that were not decontaminated, resulting in dangerous chemicals soaking through his clothing into his skin. Claimant experiences moodiness and depression, disorientation, confusion, and unintended weight gain.<sup>22</sup> Claimant now also has periodontal problems, requiring the extraction of eight teeth.<sup>23</sup> While Claimant was in the desert, he had three fillings fall out.

Claimant has endured other problems since his return from the Gulf including chest pains, gastrointestinal problems accompanied with continuous diarrhea, urinary incontinence, blurred vision, and occasional dizziness.<sup>24</sup> Claimant experienced none of these problems prior to the war and stated that all of these problems have progressively worsened.

After Claimant was terminated by Employer in April 1991, he did not work until 1992. Claimant first went to work at a Custom's warehouse loading containers for export to Sweden and Norway. He continued to work there until 1995, when he experienced physical problems that prevented him from performing his job,

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<sup>20</sup>Claimant's post-trial brief stated that Claimant's last day of work was August 20, 1996.

<sup>21</sup>Claimant began to experience the throbbing pain a few months after his return to the States. Claimant's other symptoms developed over a period of time.

<sup>22</sup>The VA prescribed anti-depressant medicines for Claimant. Claimant had seen the VA psychiatric department in 1994, because the VA told Claimant his problems originated in his mind. Claimant's other symptoms developed over a period of time.

<sup>23</sup>Claimant stated that prior to the war his teeth were in "medium" shape.

<sup>24</sup>Claimant experienced chronic diarrhea prior to leaving the Gulf and upon his return to the States. Claimant's other symptoms developed over a period of time.

including problems with climbing in and out of forklifts, bending down, kneeling down, etc. Claimant stated that his work tired him. At that point, Claimant switched jobs because of his health and became a reposessor of automobiles. He continued with that job until August 1996, and has not worked since then. Claimant stated that his health problems had no impact on his earning less money, and that he is not making a claim for loss of wage-earning capacity prior to August 1996.

Claimant has tried to work since August 1996, but has been unsuccessful. Claimant felt that his symptoms of numbness and fatigue interfered with a full-time job. Claimant has trouble standing and sitting for long periods of time, and all of his past jobs have involved using his body in some manner. Claimant also has had an authority problem since returning from the Gulf. Claimant explained that if the federal government could lie to an individual then how could he trust other figures in authority to be truthful.

Claimant first learned of the Defense Base Act when talking to his attorney. His claim was subsequently filed in 1996, about one month after that discussion.<sup>25</sup> Prior to 1996, Claimant suspected a connection with his symptoms and the Gulf War, but his suspicions were not confirmed by any medical doctor.

Employer's Exhibit 19 is the vocational rehabilitation assessment and labor market survey of Nancy Favaloro, a licensed rehabilitation counselor, dated November 16, 2000. In making her assessment of Claimant, Ms. Favaloro reviewed the following material: answers to interrogatories, Claimant's earning records and deposition, medical records of VA Hines Hospital and Drs. Rabinowitz, Vora, Rea, Didriksen, Lopez and Heilbronner, and the records from the Army.

Ms. Favaloro's report discussed Claimant's background, education, employment history, and medical history. Her analysis found that Claimant had acquired skills in the past that were transferrable into many work settings. Dr. Lopez found that Claimant had no physical restrictions and Dr. Rea believed Claimant could perform jobs in the light physical demand level. "There is no reason that Claimant would not be successful in obtaining employment that he is otherwise qualified for." (Employer's Exhibit 19, page 4)

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<sup>25</sup>See Claimant's Exhibit 71, Claimant filed his claim on April 18, 1996.

As Claimant resides in the Chicago area, Ms. Favaloro found available jobs for an individual in that area with Claimant's work experience, transferrable skills and abilities. It was Ms. Favaloro's belief that Claimant could be employable in the following jobs: route sales, dispatcher, unarmed security officer, driver, delivery driver, bus driver, dispatch clerk, manager trainee, and entry level service advisor. The wages for these jobs range between \$18,000 and \$30,000 per year at entry level.

Claimant's Exhibit 76 is Claimant's social security earning records from January 1971 through December 1995. Employer's Exhibit 13 contains Employer's LS-202 and LS-207. Employer's Exhibit 12 is Claimant's answers to Employer's interrogatories, including Claimant's average weekly wage computation. Claimant has received social security disability from March 1998 to the present. Employer's Exhibit 14 is extracts from Claimant's personnel file while employed by Employer. Claimant's salary was \$25,000 per year, payable in bi-weekly increments of \$961.53 per pay period.<sup>26</sup>

In addition to the foregoing, Claimant's Exhibits 7-46, 55-69, 77, 83-98 and Employer's Exhibits 1-10, 16 are various articles and studies relating to the Gulf War. Also included is Claimant's Exhibit 81, a videotape documenting Gulf War illness. All of these exhibits have been read and/or viewed. When applicable, the information from these exhibits will be cited in the opinion.

### Medical Evidence

Claimant's Exhibit 4 and Employer's Exhibit 15 are Claimant's medical records from Hines VA Hospital dating from 1993 through 1997. On March 30, 1993 Claimant was examined at the Dermatology clinic. His chief complaint was skin lesions that had begun during Desert Storm. Claimant was evaluated on June 13, 1994 by the ER and subsequently, the Dental Clinic, for an abscessed tooth. On

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<sup>26</sup>Overseas additives were included: foreign service premium equal to 15% of the employee's monthly base salary; a hardship allowance of 20% of base salary; a commodities and service allowance, a danger premium up to a maximum of 25% of the employee's base salary, and a service award equal to one-half a month's base salary for each year of service or 15% of earned annual base salary in effect at the time of completion of the assignment.

examination, it was noted that Claimant had gum swelling, tenderness, and overall “very poor dentia.”

On March 22, 1994, Claimant was examined for an increased percentage evaluation of tarsal tunnel syndrome, left foot fracture and bilateral high frequency hearing loss. Claimant’s increased evaluation for all three issues was denied. “The evaluation of the tarsal tunnel syndrome remained at 0 % because there was no indication of the malunion or nonunion of the tarsal or metatarsal bones as is required for an evaluation greater than 0 %. The evaluation of the left foot condition remains 0 % as the moderate foot injury needed for an evaluation greater than 0 % is not shown. The evaluation remains 0 % as the hearing loss is not severe enough to warrant a comprehensive evaluation.” (EX 15, page 1)

Claimant was examined by the Neurology clinic on June 14, 1994. Claimant had tarsal tunnel syndrome, related to his military service, and subsequently experienced pain in the medial compartment of his left ankle. Claimant was experiencing numbness and burning in his feet and the lower third of his legs. A notation was made regarding peripheral neuropathy.

Claimant was examined by the Psychiatry Department on October 21, 1994. Claimant complained of problems sleeping, dealing with his anger and hostility, depression, anxiety and confusion. The doctor’s impression was adjustment disorder with mixed features of emotion and conduct with anxiety/depression. Claimant was admitted to the hospital later that evening. His chief complaint upon admission was racing and confused thoughts, insomnia, and homicidal ideation. Upon examination, Claimant had decreased feeling on the tops of his feet, paranoia of dying because of rotten teeth, and spots on his buttocks.<sup>27</sup>

While in the hospital, Claimant had difficulty sleeping and required a sleep aid. Upon further examination, Claimant was assessed with depressive behavior. Notations on Claimant’s record indicate that this was Claimant’s first psychiatric admission. It was noted that Claimant showed poor judgment because he stated he had thoughts of killing his father-in-law. It was also noted that Claimant was in the Persian Gulf as a civilian, and has had problems without support from the VA. Claimant was diagnosed with anxiety and anger interfering with his functions.

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<sup>27</sup>The actual notation read: Spots on buttocks from Desert Storm (?) (CX 4, page 15)

Dr. Michael Blacsoniere, a clinical psychologist, performed a psychological assessment of Claimant on October 25, 1994, while Claimant was in the hospital. The tests administered to Claimant included the Shipley Institute of Living Scale and the Millon Clinical Multi-axial Inventory-II (MCMI-II). The Shipley Scale indicated that Claimant's intellectual functioning was in the average range. The MCMI-II indicated that Claimant's basic personality pattern was characteristic of an individual with severe mixed personality disorder which could manifest traits of histrionic personality disorder. During the assessment, Claimant was anxious and depressed. The test also indicated problems with drug abuse and dependence. Dr. Blacsoniere's diagnosis was "Axis I: Adjustment disorder with depressed mood, cannabis abuse, r/o alcohol abuse, r/o delusional disorder. Axis II: Personality disorder not otherwise specified." (CX 4, page 26)

On October 26, 1994, Claimant was evaluated in the hospital by Dr. Gratzner. He diagnosed Claimant with malfunctional disorder. Claimant was discharged from the hospital later that day with the diagnosis of adjustment disorder. Claimant denied treatment and requested a discharge, stating he may return after taking care of problems with his house. Upon discharge, Claimant denied suicidal or homicidal ideation.

On January 19, 1995, Claimant was examined and evaluated by a P.C.T. intern at the Post Traumatic Stress Disorder Clinic. Claimant stated that he was a civilian in Kuwait during Desert Storm and witnessed SCUD attacks. "In terms of PTSD (post traumatic stress disorder) symptomatology, Claimant complained solely of anxiety in response to loud noises. This may indicate partial PTSD in relation to non-combat experiences. Claimant's chief complaints seem to be marital discord, job difficulties, and frustration over not being granted VA benefits. Claimant does not meet criteria for war-related PTSD (including war time stressors)." (EX 15, page 3)

On January 24, 1995, Claimant was further assessed for PTSD. Claimant complained solely of one PTSD symptom, anxiety in response to loud noises. Claimant did not report other PTSD symptoms, such as re-experiencing, avoidance and increased arousal. Based on the clinical interview, Claimant did not meet PTSD criteria.

On February 14, 1995, Claimant completed a P.C.T. questionnaire.<sup>28</sup> He scored high on the self-reporting scales for PTSD. Apparently, Claimant identified more PTSD symptoms on the questionnaire than he did during the clinical interview. “There appears to be a discrepancy between the clinical interview and questionnaire scores.” (EX 15, page 5)

On May 5, 1995 Claimant was examined by the VA. Notations indicated that Claimant had left tarsal tunnel syndrome, but those symptoms had improved. Claimant was previously seen on July 1, 1994 for numbness and burning in his feet. An exam revealed that Claimant had decreased sensation above the knees and elbows.

On August 4, 1995 Dr. Richard Wilson, an electromyographer, performed nerve conduction studies and a needle examination. Claimant requested the evaluation because of burning sensations in his feet. Claimant had decreased sensation below the knees. Dr. Wilson’s impression after performing the sensory nerve conduction studies and the EMG was that his findings were “consistent with a moderate peripheral neuropathy that is predominately sensory.” (CX 4, page 31)

Claimant was again examined by the VA on November 11, 1995. Claimant’s symptoms included abscessed teeth, boils, blood in stool and urinary incontinence. Claimant complained of possible skin exposure to leishmaniasis, lesions on his back, legs and buttocks since April 1991. The diagnostic impression was dental abscess, urinary incontinence, lower GI bleeding and acne. Notes were made that Claimant saw a neurologist for his leg pain, experienced Desert Storm and tarsal tunnel syndrome.

Claimant had three teeth extracted by the Dental Department on November 22, 1995. On July 10, 1996 Claimant was examined by the VA. His symptomatology included tingling in both of his hands and feet, tiredness, weight gain and slowness. Upon examination there was decreased sensation in both hands and feet. Claimant also had a cough severe enough to limit his activities.

Claimant was examined by the Neurology department on October 9, 1996. He continued to complain of numbness in both feet and hands and decreased

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<sup>28</sup>This questionnaire was not offered into evidence.

sensation to both knees and elbow. On October 18, 1996, Claimant was again examined with symptoms of headaches, skin lesions, insomnia, PTSD, depression and atypical chest pain. The doctor's impression was peripheral neuropathy. Etiology as yet was unidentifiable.

On October 11, 1996, Claimant was examined by the Mental Hygiene Clinic. Claimant explained that he had experienced irritability over the last few years. He becomes agitated around dogs, fried chicken and siren sounds. Claimant's further symptoms included nervousness, headaches, short term memory loss, decreased sex drive, decreased energy, decreased sleep and paranoia. Claimant drank in binges and attempted to quit smoking marijuana. Claimant was assessed with depression, post traumatic stress disorder and peripheral neuropathy.

On December 2, 1996, Claimant was given a Persian Gulf Evaluation. Claimant reported he worked on the Fox vehicle and was exposed to contaminated substances, such as Sarin and Tabun chemicals, and exposed to fallout debris from 3 SCUD missiles. Claimant had been previously diagnosed with peripheral neuropathy. Claimant's symptomatology included frequent calf and thigh cramps, isolated pain in his knees and ankles, chemical sensitivities over the past 2 years, night sweats over the past 6 months, difficulty sleeping over the past year, post traumatic stress disorder, depression, spots and lesions on his back since returning from the Gulf, headaches over the past 6 to 8 months, lack of external tolerance, difficulty concentrating, forgetfulness, episodes of chest pains over the past 2 years, and scattered ½ inch round papula lesions on his back.

On December 3, 1996, Claimant had a Persian Gulf screening.<sup>29</sup> Claimant stated that his symptomatology included hair loss, bleeding gums, fatigue, skin rashes, breathing problems, arthritis, and headaches. Since his return from the Persian Gulf, Claimant reported he had experienced difficulties with concentrating and focusing, increased anger, family problems, difficulties related to friends, isolation, sleep disturbances, increased usage of drug and alcohol consumption, financial problems, and continuous thoughts about Saudi/Kuwait deployment. The assessment was that Claimant had experienced these symptoms for the past 5 years.

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<sup>29</sup>Claimant learned of this program and screening from the *Army Times*.



That same day Claimant was also examined by Dr. Rabinowitz at the request of the State of Illinois Disability Determination Services. None of Claimant's prior medical history was provided for Dr. Rabinowitz's review. Claimant's cooperation during the exam was good. Claimant's chief complaints included post traumatic stress disorder, chronic fatigue syndrome, history of tarsal tunnel syndrome and back pain. During the physical examination, Dr. Rabinowitz noted that Claimant had poor dentition and no evidence of a rash. His impression was "possible post traumatic stress disorder, history of adjustment disorder, chronic fatigue syndrome (by history), chronic lumbosacral spine pain, and rule out tarsal tunnel syndrome." (CX 4, page 53)

Claimant was examined by the Neurology Clinic on December 4, 1996. Claimant complained of burning pain in both feet. Upon examination, it was noted that Claimant had no open lesions or ulcerations. The assessment was neuropathy with unknown origins.

Claimant underwent a 30 minute psychiatric examination on December 10, 1996, by Dr. Mahim Vora. Claimant reported his history as followed: easily irritable and angry, present in Gulf War, saw man cut in half, nightmares about death and SCUD missile attacks, scared of loud noises, occasionally cries, sleeps poorly, poor appetite, observes people hiding in shadows and feels someone watches his house. Claimant had a medical history of polyneuropathy. As regards Claimant's social history, Claimant stated he lived with his wife and had lapses of memory. Claimant had a personal history of drinking and smoking marijuana. As regards Claimant's mental status examination, he experienced delusions of persecution and believed someone was watching him. Claimant was alert but disoriented. Claimant performed poorly on his cognitive functioning test. Dr. Vora's diagnosis was "alcohol abuse, organic amnesic disorder (secondary to alcohol), and post traumatic stress disorder. Claimant related well and his behavior was appropriate. He was not withdrawn and was able to understand and carry out instructions. He handled the stress of the interview well. Based on Claimant's performance in [mathematical] calculation, disorientation, and his chemical abuse, Claimant would be unable to manage his own funds." (CX 4, page 56)

On December 18, 1996, February 5, 1997 and April 18, 1997, Claimant was evaluated by the Neurology Department. Claimant's symptoms included numbness in his legs extending to his waist, including his testicles, lower back pain, pain in his

knees and ankles, and weight gain. Claimant used marijuana to cope with the pain and arthritis. The diagnosis was peripheral neuropathy and numbness.

On December 23, 1996 Claimant was examined by the Mental Hygiene Clinic. Claimant complained of leg numbness, trouble sleeping, avoidance of people because of suspicions, low energy, depression, frustration, helpless and feeling “antsy.” Claimant was examined by the Rheumatology Clinic on January 6, 1997. His symptoms included leg numbness. The impression was no evidence of arthritis.

Claimant’s Exhibit 5 is the deposition of Dr. William Rea, taken on October 6, 2000.<sup>30</sup> Dr. Rea is board certified in cardiovascular surgery, general surgery and environmental medicine.<sup>31</sup> Dr. Rea has done research in the field of cardiovascular disease and chemical exposure. He has also written 140 peer-reviewed research papers, four text books on chemical sensitivity and chapters for numerous other text books in immunology. Dr. Rea has treated about 80 Gulf War veterans for toxic exposure and published a medical journal article regarding Gulf War illness. He also testified before the United States Congress in their investigation of Gulf War illness. Dr. Rea agreed to base his opinions, during the deposition, on reasonable medical probability.

Dr. Rea first examined Claimant on August 21, 2000. Claimant provided a history to Dr. Rea, stating he had been a civilian mechanic in the Gulf War from October 1990 to April 1991, stationed in Al-Khovar, Saudi Arabia. Claimant slowly began experiencing numbness and tingling in his hands, legs and feet, chest pains, and chronic fatigue.<sup>32</sup> He told Dr. Rea that he did not wear a pesticide uniform but instead took PB pills for the exposure.

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<sup>30</sup>Also included was Claimant’s medical file.

<sup>31</sup>Environmental medicine includes the study or effects of anything in the environment upon an individual including environmental pollutants, foods, molds, pollens, any physical phenomenon, etc.

<sup>32</sup>Dr. Rea noted that Claimant reported the chronic fatigue as onset in 1992.

Claimant explained he was first diagnosed for mycoplasma and was subsequently treated.<sup>33</sup> Claimant's symptoms since the Gulf War included white spots on his back, reddish-brown scabs, headaches, double vision, blurry vision, hearing loss, ringing in his ears, frequent sneezing, sinus infection, shortness of breath, seasonal rhinitis, bloating, sharp muscle pain, muscle fatigue and tenderness, fatigue, memory loss, dizziness, disorientation, and depression. Claimant also noticed that after the Gulf War he was more sensitive to car exhaust, perfumes, pesticides, gasoline, aerosol, disinfectants, cigarette smoke, pollens, dust and mold. His symptoms have been steadily worsening.

It was Dr. Rea's understanding that Claimant was working without limitation prior to the Gulf War. It was also Dr. Rea's understanding that prior to the Gulf War Claimant was in good health. It was noted, however, that the pre-employment questionnaire was self-reported by Claimant as to whether he suffered from certain symptoms. Dr. Rea performed numerous tests on Claimant. All of these tests, including the balance test, neuropsychological evaluation, thermography, autonomic nerve test, immune tests and brain MRI, were objective tests. It was noted that as these tests were not performed prior to the Gulf War, there was nothing to compare them to regarding Claimant's condition.

The finding of the balance, or posturography, test was compatible with damage from toxic exposure.<sup>34</sup> A brain mapping and neuropsychological evaluation was next performed.<sup>35</sup> The findings of that exam were toxic encephalopathy, and psychological factors associated with physical condition, secondary. Those findings are also compatible with damage from toxic exposure during the Gulf War.

Dr. Rea also performed a temperature thermography on Claimant. The findings from that test were compatible with toxic exposure. Two autonomic nervous system tests were performed, one through the eyes and the other in the heart area. The findings of the test in the eye region showed Claimant's autonomic

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<sup>33</sup>Microplasma is a biological infection that has been found to be more prevalent in Gulf War veterans. The United States government has performed treatment trials with antibiotics.

<sup>34</sup>This test was performed by Dr. Martinez.

<sup>35</sup>This test was performed by Dr. Didriksen, a neuropsychologist, with a speciality in toxic exposure.

nervous system's balance between sympathetic and parasympathetic, tilted towards sympathetic nervous system response, which is indicative of a pollutant injury. The findings of the test performed in the heart region were abnormal, showing the same sympathetic response and suppression of the area.

Claimant also had an immune test. The findings indicated a dysfunctional or disregulated immune system, also compatible with toxic exposure. Claimant had some blood work, with findings of normal. Claimant underwent a brain MRI scan. The findings were indicative of toxic exposure.

Dr. Rea found a pattern similar to Claimant in other Gulf War veterans. Dr. Rea was aware that Claimant had been previously tested for genetic susceptibility to exposure to organophosphates and that the test showed him to be more susceptible than the average person. It was also Dr. Rea's understanding that a large number of Gulf War veterans were exposed to low levels of organophosphate nerve gas during the war. Claimant's condition and the test results were compatible with exposure to organophosphate nerve gas.

Claimant was very cooperative during the examination and there was no evidence of malingering. Dr. Rea's opinion, based on reasonable medical probability, of what caused Claimant's physical problems since the Gulf War was "exposure to multiple toxic agents and biological agents in the Gulf." (page 21)

It was also Dr. Rea's opinion that Claimant's condition would impair him from working. Dr. Rea believed that Claimant was only capable of a menial manual job. It was Dr. Rea's opinion that Claimant's condition was permanent in nature. Claimant's condition has progressively worsened. That finding was compatible with Dr. Rea's finding in other Gulf War veterans. Dr. Rea diagnosed Claimant with "headaches, fibromyalgia, fatigue, Gulf War syndrome, acute respiratory distress, toxic encephalopathy, vertigo, umbilical hernia, neuropathy, and prosthetic hypertrophy." (page 25)

Dr. Rea was asked about Claimant's Exhibit 11, an article entitled "Medical Aspects of Chemical and Biological Warfare." He agreed with the statements in the article that "mild neuropsychiatric change occurs after even low dosage of nerve agent exposure. Neuropsychiatric effects include irritability, inability to concentrate, memory problems, sleep disturbances, anxiety, depression, and

problems with information processing in psychomotor tests.” (page 22) Dr. Rea believed that those symptoms were compatible with Claimant’s symptoms. Dr. Rea was familiar with the medical research articles listed as Claimant’s exhibits and he based his opinion in part on the medical research that has been done since the Gulf War.

Dr. Rea’s stated his opinion on causation might have been “colored” if he was told Claimant was a regular and chronic user of marijuana, alcohol, and chewing tobacco, but he still would have found Claimant’s overwhelming problem to have been the Gulf War. However, Claimant had discussed this with Dr. Rea during the examination and Dr. Rea considered it.

Dr. Rea believed that Claimant’s condition was reversible, to an extent. The ability for Claimant’s condition to be reversed depended on how Claimant responded to treatment. Dr. Rea had provided some treatment to Claimant.<sup>36</sup> Dr. Rea believed atropine sulfate might be of some benefit to Claimant.

Dr. Rea was aware that Claimant had been diagnosed with tarsal tunnel syndrome. It was his belief that tarsal tunnel was caused by inflammation of the tarsal tunnel and the tendon. Tarsal tunnel was the equivalent of carpal tunnel. Dr. Rea did not believe that tarsal tunnel syndrome could cause Claimant’s lower lymph tingling in his legs. It was Dr. Rea’s understanding that tarsal tunnel only affects the feet.

Claimant indicated to Dr. Rea that he was exposed to Sarin and Tabun, as well as fall out from 12 SCUD attacks. Claimant also had been administered bromides and vaccines. It was Dr. Rea’s belief that there was a synergistic effect between exposure to various toxic substances and using the bromide pills. In other words, any side effects relating to either the toxic substances or the bromide pills would be magnified.

Dr. Rea also performed challenge testing and determined that Claimant showed sensitivity to car exhaust, perfume, aftershave, jet fuel, car exhaust, phenyl, men’s cologne, formaldehyde, and chlorine. These sensitivities could have been

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<sup>36</sup>Claimant was offered the “Gulf War Veter - - .” (CX 5, page 26)

pre-existing and there was no test to perform which indicated which sensitivity was pre-existing.

Dr. Rea found evidence of the “spreading and switching phenomena” in Claimant. He stated that the headaches, fibromyalgia, fatigue, brain dysfunction, dizziness and neuropathy could be considered one thing, but others could consider them to have switched. Dr. Rea found evidence that Claimant’s symptoms tended to manifest themselves at different times. His symptoms would begin at a low level and then worsen.

Dr. Rea did not perform a scratch test because such a test was designed for pollens and molds and would be considered invalid for Claimant’s chemical problem. Dr. Rea did not perform a patch test or RAST test for antibodies because such tests were also considered invalid for chemical problems. Dr. Rea, if time had permitted, would have performed a booth test, another form of challenge test.

Claimant’s Exhibit 6 is the medical report of Dr. Nancy Didriksen. Dr. Didriksen, a board certified psychologist, examined Claimant on August 24 and 25, 2000, at the request of Claimant’s attorney. Dr. Didriksen was asked to perform a neuropsychological consultation to determine Claimant’s neurocognitive and personality/behavioral concomitants of toxic exposure while serving in the Persian Gulf. Dr. Didriksen administered a variety of tests, and performed a clinical interview and mental status examination of Claimant. Dr. Didriksen determined there was no evidence of malingering.

As regards physical symptoms, Claimant complained of fatigue, headache, peripheral neuropathy, tingling and throbbing in his extremities, constant tinnitus, bilateral hearing loss, sleep disturbances, night sweats, hiatal hernia, chemical sensitivity, mycoplasma infection, chronic pain, low energy, weakness, restlessness, muscle spasms, twitches, skin problems, joint pain, burning sensation in his toes and hands, “sick all over,” muscle aches, balance/coordination problems, weight gain, and loss of sense of touch.

As regards psychological symptoms, Claimant complained of irritability, exquisite sensitivity, pervading pessimism, decreased coping ability, unexplained anger, overwhelming exhaustion, fatigue or weariness, difficulty getting started in

the morning, sadness or depression with no apparent life situation sufficient to warrant it, mood swings, withdrawal from loved ones, feelings of being misunderstood by others, feeling unlike himself, anxiety, mood swings associated with weather changes, feelings of needing to punish others, increased need of tenderness and affection, tense, difficulty setting and reaching goals, difficulty dealing with adversity, dwelling on the past, and “stressed out” (10 on a 0 to 10 scale).

Claimant reported the following neurocognitive symptoms including difficulty understanding other’s speech, decreased attention, concentration, slowed thinking, decreased decision-making and problem-solving ability, confusion, loss of memory, and poor organization. Claimant also reported feelings of rage. Most anything will trigger these feelings. Claimant is easily distracted and often anxious.

Dr. Didriksen’s report detailed Claimant’s family, employment and medical histories. Claimant reported that he had been exposed to a variety of toxic substances while serving in the Gulf War, including organophosphate pesticides, fall-out from scud missiles, solvents, petrochemicals, cigarette smoke, exhaust fumes, and the pyridostigmine bromide pills. Dr. Didriksen reviewed records of Claimant’s educational awards and achievements prior to the Gulf War, as well as a pre-employment physical which indicated that Claimant was a healthy male. She also reviewed medical records subsequent to Claimant’s service in the Gulf.

Dr. Didriksen opined that Claimant’s primary problem was toxic exposure and resultant illness. “Claimant’s test results were consistent with self-report, as well as consistent with other individuals exposed in the Persian Gulf who have been evaluated in this office and reported in the literature.” (page 12) Dr. Didriksen’s diagnostic impression was “toxic encephalopathy (mild to moderate, chronic, reversibility uncertain without treatment and avoidance of toxic/neurotoxic substances) and psychological factors associated with (but secondary to) physical condition classified elsewhere.” (page 12)

Dr. Didriksen recommended that Claimant be awarded compensation for toxic exposure experienced during the Gulf War, avoidance of toxic/neurotoxic substances, and re-evaluation in 12 to 18 months. She also recommended the use of lists to compensate for Claimant’s memory loss, as well as active learning to improve executive functioning, a formal neurocognitive rehabilitation program to

teach skills to cope with memory loss and executive functioning, and therapy to help Claimant deal with his many losses.

Employer's Exhibit 18 is the medical report of Dr. Robert Heilbronner. Dr. Heilbronner, a diplomate in clinical neuropsychology and a board certified psychologist, examined Claimant on September 14, 2000, as a referral from the Medical Evaluation Specialists. A neuropsychological evaluation was requested to assess Claimant's current level of neurocognitive and emotional functioning and to determine causal contributions, particularly as it related to possible toxic exposure while serving in the Gulf.

Claimant's symptomatology following his return from the Gulf War included severe diarrhea, headaches, peripheral neuropathy, skin lesions, severe fatigue, hearing loss, dental abscesses, anger, depression, and substance abuse. He had been previously diagnosed with peripheral neuropathy, tarsal tunnel syndrome, adjustment disorder, chronic fatigue syndrome, depression, and post traumatic stress disorder.

Dr. Heilbronner interviewed Claimant and reviewed the medical reports from Hines Veteran's Affairs Medical Center, a disability examination by Midwest Medical Providers, a psychological examination by Dr. Mahim Vora and a neuropsychological evaluation by Dr. Nancy Didrikson.

During the interview, Claimant reported pain and numbness in his lower extremities, hand and finger tips. Claimant's expressed mood and range of affect were consistent with anger, frustration and depression. Dr. Heilbronner did not observe evidence of delusions, hallucinations or other forms of psychosis. Claimant stated that he believed in a government conspiracy relating to a "cover up" of information regarding chemical weapons during the Gulf War, however, his belief had not yet reached a delusional level.

Dr. Heilbronner administered a variety of tests. Claimant's performance was determined to be valid, therefore, the test results were considered valid and reliable. After evaluating Claimant and reviewing his prior records, Dr. Heilbronner concluded that Claimant has experienced a decline in functioning compared to premorbid levels (prior to the Gulf War). The contributions of multiple etiologic



and contributory influences to Claimant's current functioning was difficult to determine. His summary was as follows:

Potential factors include, but are not limited to, possible neurotoxicity from substances Claimant was reportedly exposed to during his service in Saudi Arabia and the associated stresses, the reported lack of support he received from the Department of Veteran's Affairs, intermittent substance abuse upon his return, marital and family stresses (including the death of his wife), and overwhelming distress associated with limited coping resources. It is likely that all of these factors represent contributing aggravations and these occur in the context of pending litigation (e.g., secondary gain). Nevertheless, Claimant's neurocognitive and sensory motor difficulties are generally consistent with symptomatology reported in some research studies and case reports of Gulf War veterans and they cannot be explained entirely to psychosocial stress and/or motivational factors. Claimant's somatic concerns are consistent with symptoms of the 'multi-system syndromes' including chronic fatigue syndrome, fibromyalgia, and multiple chemical sensitivity frequently reported by those veterans. His psychological distress may be due to interpersonal stress, adjustment issues, and poor self-efficacy and coping with his physical concerns and disability. Thus Claimant presents with a complex constellation of symptoms whose individual etiologies may only be partially determined. (page 10)

Dr. Heilbronner also determined that Claimant had reached MMI. He qualified this statement by stating it should be independently confirmed by a physician. Claimant suffered from moderate to severe physical concerns, cognitive impairments, and symptoms of emotional distress. Dr. Heilbronner recommended ongoing and aggressive physical, neurocognitive and psychological interventions. Each factor presented an obstacle to Claimant's capacity to return to gainful employment. Claimant had made no effort to return to work. However, since Claimant worked for a few years upon his return from the Gulf War, Dr. Heilbronner believed that Claimant possessed residual skills and abilities that would aid him in his return to productivity.

Employer's Exhibit 17 is the medical report of Dr. Manuel Lopez, dated October 9, 2000. Dr. Lopez is a board certified allergist and immunologist. Claimant's chief complaint included chronic fatigue, depression, anxiety, diffuse joint pains and peripheral neuropathy. Claimant presented himself for examination and related his medical history, medications, family history and social history.

Dr. Lopez performed a review of Claimant's systems and a physical examination. He observed no apparent lesions, poor dentation, decreased sensation to prick in both extremities, and Claimant's mental status was alert, oriented, and cooperative, with an intact memory. Dr. Lopez also reviewed Claimant's past medical records from the VA Medical Center.<sup>37</sup> He determined that Claimant had a history of heavy alcohol and marijuana use prior to 1989, and was unable to hold a job after 1985. Medical records from 1991 to 1994 indicated that Claimant did not have significant medical problems. In 1995 Claimant was diagnosed with peripheral neuropathy.

Dr. Lopez's opinions were based on Claimant's history, medical examination and review of the medical records:

There is no evidence that Claimant suffered any acute medical problems as a result of exposure to the work environment during the Gulf War. No significant chronic effects were seen from 1991 to early 1994. It is very difficult to assess the role of the work environment in his current medical problems since no acute symptoms occurred following exposure and no chronic symptoms developed for 3 years following exposure. The symptoms of depression and anxiety are very common psychiatric problems seen in medical practice. A complication factor is the history of alcohol abuse and routine use of recreational drugs, conditions that are frequently associated with the same symptomatology. There is no indication that Claimant had any significant impairment of the immune system. There is no history of increased incidence of severe infections, autoimmune or severe hypersensitivity reaction. (page 4)

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<sup>37</sup>No records prior to 1992 were available for Dr. Lopez's review.

## Findings of Fact and Law

### Classification of injury

In some instances the classification of the claimed disability as an occupational disease or traumatic injury may or may not ultimately determine whether proper notice was given, as well as whether a timely claim was filed. *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d. Cir. 1989), *aff'd* 22 BRBS 170. I can find no appellate decision on whether or not Gulf War Syndrome is traumatic or occupational in nature; however, it is my finding that Gulf War Syndrome is more similar to an occupational disease, and as such, the occupational disease provisions of the LHWCA should apply in evaluating this claim. My reasoning is as follows.

First, prior Board case law has applied the occupational disease provisions of the Act to work-related injuries that are potential hazards to an entire class of employees in employment similar to that of the claimant. *See Gencarelle*, 892 F.2d 173, 23 BRBS 13 (CRT). The risk of toxic exposure in the Persian Gulf was a potential hazard to the entire group of employees working in the same area as Claimant. Claimant was employed as a mechanic during the Gulf War. He testified that he and the other mechanics were consistently located in or near the combat areas where toxins were present. Also, all of Employer's employees were given chemical suits and gas masks. Claimant testified that he continually heard chemical alarms sounding in his immediate area. In addition, Employer wrote a memo stating that an entire class of employees in the Persian Gulf area, where Claimant worked, were at risk of being exposed to toxins.<sup>38</sup>

Second, the Act defines disability as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902 (10). Claimant's present incapacity did not immediately manifest itself during the Gulf War. Rather his disability became manifest many years later, due to the latent nature of the disease from which he suffers. It is obvious that Congress had a situation such as Claimant's in mind when it enacted Sections 12 and 13 of the Act. These sections provide an extended time period to file and give notice to the employer if an employee suffers from an

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<sup>38</sup>See Claimant's Exhibit 68.

occupational disease. These provisions are intended for situations in which the work-related disability does not immediately manifest itself. The extended time limit in both sections is contingent on employee awareness of the relationship between the injury, employment and disability. In the instant case, Claimant was not aware of the relationship between his disability and overseas employment until years after his return from the Gulf.

Third, the Ninth Circuit held in *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (1991), that the time of injury was the date when disability attributable to the injury became manifest, not the time of accident. The specific issue in that case was whether the victim of a traumatic injury should be compensated at the average weekly wage rate as of the time of the accident, or as of the subsequent time when the disability attributable to the injury became manifest. The court reasoned that the time of injury was when the employee was aware of the impairment, as opposed to the time of the original accident.

The court discussed its previous ruling of an asbestos case, *Todd Shipyard Corp v. Black*, 717 F.2d 1280 (9<sup>th</sup> Cir. 1983), in which it held that the time of injury for an occupational disease was the time when the disability due to the disease manifested itself. The *Black* decision was later codified in Section 910(i) of the Act, which states “with respect to a claim for compensation for disability due to an occupational disease which does not immediately result in disability, the time of injury shall be deemed to be the date on which the employee becomes aware of the relationship between the employment, the disease and the disability.” This court also has interpreted the word “injury” to mean the date of onset of disability rather than the specific time of the accident. See *Todd Shipyard Corp. v. Allan*, 666 F.2d 399, 401-02 (9<sup>th</sup> Cir. 1982); *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180 (9<sup>th</sup> Cir. 1990). In this instance, Claimant’s disability did not manifest until years later after exposure in the Gulf. I adopt the Ninth Circuit’s reasoning and conclude for all of the reasons previously articulated, that Gulf War Syndrome is an occupational disease.

### Section 12 Timely Notice

Section 12(a) of the Act provides that “Notice of injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is

aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of a relationship between the injury or death and the employment, except that in the case of occupational disease . . . notice shall be given within one year . . .” See *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990); *Sheek v. General Dynamics Corp.*, 18 BRBS 1 (1985), *on recon.*, 18 BRBS 151 (1986). The judge must determine the date on which the claimant became aware of, or should have become aware of, the relationship between the injury, the employment and the disability. *Martin v. Kaiser Co.*, 24 BRBS 112 (1990). It is the claimant’s burden to establish timely notice.

During Claimant’s employment in the Persian Gulf, from October 4, 1990 through April 30, 1991, Claimant testified that he did not experience any symptoms that would cause him to believe he had been injured. Claimant experienced chronic fatigue and throbbing joint pain a few months after his return from the Gulf. It is obvious that Claimant was not aware of the work-related nature of his subsequent health problems during his period of employment in the Persian Gulf.

Claimant testified that he experienced deteriorating health following his employment with Employer, but that his health remarkably worsened in 1994. Self-reported histories in his medical records show that Claimant suspected he could have been exposed to chemicals during the Gulf War. Claimant was unable to effectively corroborate his suspicions through independent research, however, because the US government had not published any reports concerning the nature and extent of toxic exposure in the Persian Gulf during this period. In addition, the physicians treating him during this time, prior to 1996, provided no medical basis to corroborate his suspicions. They diagnosed Claimant with adjustment disorder, anxiety, peripheral neuropathy, urinary incontinence, lower GI bleeding, acne, and dental abscess. In fact, as of October 18, 1996, the etiology of Claimant’s symptoms continued to be unidentifiable.

Despite the lack of an affirmative diagnosis, however, because of his suspicions and after meeting with his attorney, Claimant, on April 18, 1996, filed his claim in this matter. Employer was given notice of this claim on May 24, 1996. In other words, Claimant actually filed his claim and made Employer aware of his claim even before he himself was aware of the relationship between his condition and his employment. Therefore, I find timely notice pursuant to § 12(a).

Despite my finding, even assuming Claimant's notice was untimely, Employer in this instance has shown no prejudice. Section 12(d) of the Act will excuse the claimant's untimely notice to employer, if employer was not prejudiced by the failure to provide such notice. *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 34 (1989); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986). Prejudice is established when the employer demonstrates that, due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972, 8 BRBS 161 (5<sup>th</sup> Cir. 1978), *rev'g* 2 BRBS 272 (1975); *White v. Sealand Terminal Corp.*, 13 BRBS 1021 (1981). In the absence of evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, that an employer has been given sufficient notice under Section 12. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). Accordingly, an employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant's failure to provide adequate notice. *See Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). A generalized claim of not being able to investigate while the claim is still fresh is insufficient to prove prejudice. *See Ito Corporation v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT) (5<sup>th</sup> Cir. 1989).

Employer here offered no evidence showing it was prejudiced by untimely notice. To the contrary, Employer had knowledge and notice, as early as November 14, 1991, of a possible relationship between employment during the Gulf War and resulting work-related injuries. An inter-office memo, dated November 14, 1991, stated that Employer was aware of potential long-term health hazards to its employees due to exposure of harmful toxins during the Gulf War.<sup>39</sup> Employer, therefore, had knowledge of possible toxic exposure with resulting disability well before Claimant, and more than four years prior to Claimant filing his claim.

In addition, while notice was given to Employer in May 1996, Employer did not examine Claimant until September 2000, more than four years later. Employer had sufficient opportunity to investigate this claim and provide medical services at the time Claimant provided notice. In sum, Employer has made no showing it was prejudiced.

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<sup>39</sup>See Claimant's Exhibit 68.

### Section 13 Timeliness

Section 13 (a) of the Act provides that Claimant has one year to file a claim after injury. The time for filing will not begin to run until the employee is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. Section 13 (b) of the Act provides that if the injury is classified as an occupational disease, the claimant will have two years in which to file his claim. This time does not begin to run until the employee is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment.

For the reasons previously provided, I find Claimant filed his claim prior to his true awareness of the relationship between his condition and his employment, and regardless of the time period, Claimant's claim was timely filed.

### Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). It must be further recognized that all factual doubts must be resolved in favor of Claimant. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5<sup>th</sup> Cir. 1969). Furthermore, it has been consistently held that the Act must be construed liberally in favor of Claimant. *Voirs v. Eikel*, 346 US 328, 333 (1953); *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5<sup>th</sup> Cir. 1987).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

Claimant alleges that he sustained exposure to toxic substances while employed by Employer during the Gulf War in Saudi Arabia and Kuwait from October 4, 1990 through April 30, 1991. There is no evidence to refute Claimant's claim that he was exposed to toxic agents during his period of overseas employment. Claimant also testified that he suffers from chronic fatigue syndrome, chronic sleep disorder, numbness in both his hands and legs, throbbing joint pain, chronic headaches, lesions, cuts and boils on his back, legs, and hands, moodiness, depression, disorientation, confusion, unintended weight gain, significant dental problems, chest pains, gastrointestinal problems accompanied with continuous diarrhea, urinary incontinence, blurred vision and occasional dizziness. Claimant claims that these symptoms are evidence of Gulf War syndrome, a chronic multi-symptom condition.

The Center for Disease Control's 1998 case definition of "Gulf War Illness" is "a chronic multi-symptom illness." One or more of the listed chronic symptoms must present for six months or more. These categories are fatigue, mood/cognition related symptoms (including feelings of depression, difficulty remembering or concentrating, feeling moody, anxious, trouble finding words, lack of interest in sex or difficulty sleeping), and musculoskeletal related symptoms (including joint pain, stiffness, or muscle pain).<sup>40</sup> Claimant alleges that he suffers from symptoms in all three of the CDC's categories. He maintains that his symptoms have manifested over the last six years, well over the case definition's minimum six month period.

Claimant relayed consistent symptoms to all of the physicians who examined him. He testified that he was in excellent physical and mental health prior to his employment with Employer. His testimony is bolstered with his pre-employment physical as well as his excellent occupational performance while in Saudi Arabia. Claimant's testimony regarding his present state of poor health is therefore credible and supports his contention that he suffered a harm during the Gulf War.

The medical evidence presented likewise supports Claimant's allegations of an injury. Prior to Claimant's employment in the Gulf, he was asymptomatic as evidenced by his 1990 pre-employment physical examination. This pre-employment physical showed that Claimant was in excellent health. Examinations of Claimant

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<sup>40</sup>See Claimant's Exhibit 26, page 30.



subsequent to his employment in the Gulf, however, revealed deteriorating mental and physical health.

Claimant was examined by Hines VA Hospital from 1993 through 1997. During that time period, Claimant was diagnosed with peripheral neuropathy, adjustment disorder, anxiety, depression, and post traumatic stress disorder. The medical records indicated that the etiology of Claimant's symptoms was unknown. It was not until Claimant was examined by Dr. Rea that a possible etiology regarding Claimant's symptoms was unearthed.

Dr. William Rea, a specialist in environmental medicine, examined Claimant on August 21, 2000. Dr. Rea took a history of Claimant and performed numerous objective tests on Claimant including a balance test, neuropsychological evaluation, thermography, autonomic nerve test, immune tests and a brain MRI. All of the findings from the tests were compatible with damage from toxic exposure during the Gulf War. Dr. Rea stated that Claimant's symptoms were compatible with those of combat veterans diagnosed with Gulf War Illness. Dr. Rea opined that Claimant suffered from "exposure to multiple toxic agents and biological agents in the Gulf." Claimant's own testimony is supported by Dr. Rea's medical conclusion and is sufficient to constitute evidence of physical injury.

Dr. Nancy Didriksen examined Claimant on August 24 and 25, 2000. Dr. Didriksen is a board certified psychologist. She performed a clinical interview of Claimant and administered numerous tests. Dr. Didriksen too opined that Claimant suffered from toxic exposure and resultant illness. Claimant's test results were consistent with self-report, as well as consistent with other individuals exposed in the Persian Gulf who have been evaluated in Dr. Didriksen's office and reported in the literature. Dr. Didriksen's impression was "toxic encephalopathy (mild to moderate, chronic, reversibility uncertain without treatment and avoidance of toxic/neurotoxic substances) and psychological factors associated with (but secondary to) physical condition classified elsewhere." Her report, therefore, supports Claimant's contention that he suffered neuropsychological damage while in the Gulf War. Claimant's own testimony is supported by Dr. Didriksen's medical conclusion and is sufficient to constitute evidence of mental injury.

In order for Claimant to establish the existence of working conditions which could have caused the harm, Claimant must show that he was in the area of

exposure and that his condition was caused by, or likely to be caused by his employment. Title XVI, of Division C, of Public Law 105-277, “Service Connection for Persian Gulf War Illnesses” does not directly relate to civilian defense workers, but I find it should be considered as persuasive in establishing Claimant’s existence of possible working conditions. This law provides a legal presumption for U.S. Military Veterans that they were exposed to a list of toxic substances during the Gulf War. Claimant alleges exposure to several of the substances on the list, including pyridostigmine bromide, pesticides, Sarin, Tabun, diesel heater fumes, and leishmaniasis. Claimant has also sufficiently proven that he was in close proximity to areas containing toxic chemicals, such as the nerve gas plume emitted from Khamisiyah.

It is uncontested that Claimant was employed by Employer in Saudi Arabia and Iraq during the Persian Gulf War and that he was stationed in contaminated areas. The working conditions which Claimant argues caused his health condition included use of the anti-nerve gas pill, pyridostigmine bromide, exposure to low-level Sarin within the nerve gas plume, pesticides, oil fire and human waste smoke, sand flies and mosquitos, heat extremes, dust storms and diesel fumes from fuel and heaters. Additionally, Claimant relies on congressional findings and numerous medical articles to support his contention that his symptoms were caused by exposure to toxic substances.

Claimant testified and presented uncontested evidence showing he was located within the area covered by the nerve plume from Khamisiyah.<sup>41</sup> The evidence in the record is sufficient to establish that Claimant was issued pyridostigmine bromide anti-nerve gas pills to counteract possible chemical agents.<sup>42</sup> Claimant testified that he took these pills. Claimant also submitted a memo stating that Employer’s employees were in fact given various prophylactic treatments for chemical and biological threats (nerve agents, Anthrax, etc.).<sup>43</sup>

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<sup>41</sup>See Claimant’s Exhibit 12 and 74..

<sup>42</sup>See Claimant’s Exhibit 75.

<sup>43</sup>See Claimant’s Exhibit 68.

Claimant presented medical articles regarding the hazards of exposure to organophosphates, such as Sarin.<sup>44</sup> Dr. Rea testified that Claimant had been previously tested for genetic susceptibility to exposure to organophosphates and that the test showed Claimant to be more susceptible than the average person.

Claimant presented credible testimony that he was also exposed to pesticides, oil fire and human waste smoke, sand flies and mosquitos, dust storms, heat extremes and diesel fumes from fuel and heaters. He presented substantial evidence in medical articles and congressional reports outlining the effects and symptoms of exposure in these situations. In addition, both Drs. Rea and Didriksen opined that Claimant was exposed to multiple toxic agents and biological agents in the Gulf. Claimant was only present in the Gulf during his employment with Employer.

In sum, I find that Claimant has provided sufficient evidence, through his testimony, as well as the testimony of Drs. Rea and Didriksen, in addition to various medical articles and congressional reports, to establish that he suffers both physical and mental injury and working conditions existed during his employment with Employer in Saudi Arabia and/or Iraq which could have caused his injuries. Consequently, Claimant has satisfied both prongs of the causation inquiry and invoked the Section 20 presumption.

Employer is unable to rebut the Section 20 presumption with substantial and countervailing evidence. But assuming rebuttal, after weighing the evidence as a whole, I find that Claimant has still established causation.

In order to rebut the presumption, Employer offered the medical reports of Drs. Lopez and Heilbronner, as well as various articles.<sup>45</sup> Dr. Lopez, an immunologist, allergist and rheumatologist, examined Claimant on October 9, 2000. He performed a review of Claimant's systems and a physical examination. Dr. Lopez also reviewed Claimant's past medical records from the VA Medical

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<sup>44</sup>See Claimant's Exhibit 63.

<sup>45</sup> Employer's Exhibit 1 was a replica of Claimant's Exhibit 63, which was a medical article I previously reviewed and which actually supported Claimant's position. Employer's Exhibits 2-10 included various website articles and newspaper articles. While interesting reading, the trustworthiness of these website articles is questionable. Also, while the newspaper articles are informative, they are merely one reporter's opinion about the existence of Gulf War Syndrome.

Center.<sup>46</sup> He determined that Claimant had a history of heavy alcohol and marijuana use prior to 1989, and was unable to hold a job after 1985. Medical records from 1991 to 1994 indicated that Claimant did not have significant medical problems. In 1995 Claimant was diagnosed with peripheral neuropathy.

Dr. Lopez's opinions were based on Claimant's history, medical examination and review of the medical records. He determined that there was no evidence that Claimant suffered any acute medical problems as a result of exposure to the work environment during the Gulf War. No significant chronic effects were observed in Claimant from 1991 to early 1994. Dr. Lopez stated that it was very difficult to assess the role of Claimant's work environment in his current medical problems because no acute symptoms occurred following exposure and no chronic symptoms developed for 3 years following exposure.

Dr. Lopez stated that Claimant's symptoms of depression and anxiety were common psychiatric problems seen in medical practice. A complication factor in determining the etiology of Claimant's problem was his history of alcohol abuse and routine use of recreational drugs, conditions that have been frequently associated with symptomatology the same as Claimant's. Dr. Lopez found no indication that Claimant had any significant impairment of the immune system and he observed no history of increased incidence of severe infections, auto-immune or severe hypersensitivity reaction.

Dr. Lopez is qualified as a allergist and immunologist. However, he does not allege any particular experience with evaluating Gulf War Veterans or any particular knowledge of the chemical exposure associated with employment in combat zones.

Claimant was also examined by Dr. Heilbronner, a diplomate in clinical neuropsychology and a board certified psychologist, on September 14, 2000. A neuropsychological evaluation was requested to assess Claimant's current level of neurocognitive and emotional functioning and to determine causal contributions, particularly as it related to possible toxic exposure while serving in the Gulf.

Dr. Heilbronner interviewed Claimant, reviewed various medical reports and administered a battery of tests. After evaluating Claimant and reviewing his prior

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<sup>46</sup>No records prior to 1992 were available for Dr. Lopez's review.

records, Dr. Heilbronner concluded that Claimant had experienced a decline in functioning compared to premorbid levels (prior to the Gulf War). Dr. Heilbronner stated that Claimant's current functioning was difficult to determine because of multiple etiologic and contributory influences. He opined:

Potential [etiologic] factors include, but are not limited to, possible neurotoxicity from substances Claimant was reportedly exposed to during his service in Saudi Arabia and the associated stresses, the reported lack of support he received from the Department of Veteran's Affairs, intermittent substance abuse upon his return, marital and family stresses (including the death of his wife), and overwhelming distress associated with limited coping resources. It is likely that all of these factors represent contributing aggravations and these occur in the context of pending litigation (e.g., secondary gain). Nevertheless, Claimant's neurocognitive and sensory motor difficulties are generally consistent with symptomatology reported in some research studies and case reports of Gulf War veterans and they cannot be explained entirely to psychosocial stress and/or motivational factors. Claimant's somatic concerns are consistent with symptoms of the 'multi-system syndromes' including chronic fatigue syndrome, fibromyalgia, and multiple chemical sensitivity frequently reported by those veterans. His psychological distress may be due to interpersonal stress, adjustment issues, and poor self-efficacy and coping with his physical concerns and disability. Thus Claimant presents with a complex constellation of symptoms whose individual etiologies may only be partially determined.

Dr. Heilbronner determined that a possible etiology of Claimant's problem was due to neurotoxicity from substances Claimant was exposed to during his employment with Employer in the Gulf. In addition, he opined that Claimant's neurocognitive and sensory motor difficulties were consistent with symptomatology reported in research studies and case reports of Gulf War veterans. Claimant's somatic symptoms were also consistent with those reported by other Gulf War veterans. While Dr. Heilbronner's testimony was offered by Employer, it appears to support Claimant's contention that he suffers from Gulf War Syndrome.

Because Dr. Lopez lacks the experience Dr. Rea possesses with Gulf War veterans, and because Dr. Heilbronner's testimony is not contrary to Dr. Rea, I question Employer's rebuttal evidence as substantially sufficient to rebut the § 20 presumption. If so, however, when weighing the evidence as a whole, I rely upon the opinions of Drs. Rea and Didriksen and conclude that Claimant's condition is related to his overseas employment with Employer.

### Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5<sup>th</sup> Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

The only doctor who opined whether Claimant reached MMI was Dr. Heilbronner, a psychologist. However, Dr. Heilbronner qualified his statement by stating it should be independently confirmed by a physician. Neither Dr. Rea nor Drs. Didriksen or Lopez made any mention of MMI. However, Dr. Rea stated that with treatment, Claimant's condition could possibly improve. I, therefore, conclude that Claimant has yet to reach MMI. As such, any compensation awarded to him will be temporary in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1<sup>st</sup> Cir. 1940). A claimant who shows he is unable to

return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5<sup>th</sup> Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5<sup>th</sup> Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

After the Gulf War until 1996, Claimant resumed working for various employers. Claimant testified that he did not suffer a loss of wage earning capacity prior to 1996, and as such, is not making a claim for compensation during that time period. When his symptoms worsened in 1996, Claimant stopped working as a repossessor of cars. He testified that when he drove the cars, his legs and lower extremities fell asleep, making it difficult or nearly impossible to move his feet to brake. Claimant realized that he could no longer effectively perform his job. Since August 20, 1996, therefore, Claimant has not worked. Claimant also testified that he had an authority problem, which may have contributed to his lack of work. Regardless, the evidence shows that the overwhelming reason for why Claimant discontinued working was because of his medical condition.

The only doctor to speak to whether or not Claimant could physically perform a job was Dr. Rea. Dr. Rea testified that he believed Claimant could physically perform light labor jobs. Ms. Favaloro, the vocational rehabilitation counselor, identified such jobs in the Chicago area. However, no evidence was offered stating that Claimant was psychologically fit to work these identified jobs.

Dr. Didriksen testified that Claimant suffered from neuropsychological problems. Dr. Heilbronner noted that as Claimant worked for a few years upon his return from the Gulf War, he possessed residual skills and abilities that would aid him in his return to productivity. However, at the conclusion of Dr. Heilbronner's report, he recommended ongoing and aggressive physical, neurocognitive, and psychological intervention. Each factor, in Dr. Heilbronner's opinion, presented an obstacle to Claimant's capacity to return to gainful employment. Both doctors

concluded, therefore, that Claimant was not mentally fit to carry out employment at this present time.

In sum, I find that while Ms. Favaloro took into consideration Claimant's physical limitations, she did not consider whether or not Claimant possessed the necessary mental and emotional capacity required for employment. As a result, I find that the alternative employment identified by Employer has not been proven to be suitable given Claimant's remaining need for aggressive psychological treatment. Consequently, I find that Claimant is temporarily totally disabled and has been since August 20, 1996, his last day of work.

### Average Weekly Wage

Claimant's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. § 910(a)-(c). Section 10(a) applies when claimant has worked in the same or comparable employment for substantially the whole of the year immediately preceding the injury and provides a specific formula for calculating annual earnings. Where claimant's employment is regular and continuous, but he has not been employed in that employment for substantially the whole of the year, the wages of similarly situated employees who have worked substantially the whole of the year may be used to calculate average weekly wage pursuant to Section 10(b). Section 10(c) provides a general method for determining annual earning capacity where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's average weekly wage at the time of the injury. *Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26 (CRT) (5<sup>th</sup> Cir. 1991); *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9<sup>th</sup> Cir. 1980); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1991).

The calculation of average weekly wage is dependent on the time of injury, which is determined by the nature of the injury. Since I found Gulf War Syndrome to be classified as an occupational disease, the provisions of Section 10(i) apply. Under this section, the "time of injury" is defined as the date at which the claimant or employee becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of the relationship between the employment, disease, and the disability. See *Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1988). However, where the work-related wage loss pre-dates the "time



of injury”, the average weekly wage should reflect earnings prior to the onset of disability, rather than the subsequent earnings at the later time of awareness. *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

In this instance, Claimant did not suffer a wage loss until he ceased working on August 20, 1996, despite the fact he had filed his claim on April 18, 1996. Consequently, it is my finding that under § 10(c), the fairest and most reasonable approach to Claimant’s wage loss is simply to divide his stipulated earnings of \$18,500 in 1996, by the number of weeks he worked in that year prior to his ceasing work due to health problems. The weeks elapsed were 33. Using this formula, it is my finding that at the time he became disabled, Claimant had an average weekly wage of \$560.61.

### Medical expenses

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5<sup>th</sup> Cir. 1981), *aff’d* 12 BRBS 65 (1980).

Claimant was examined by Drs. Rea, Didriksen, Heilbronner and Lopez. Drs. Rea, Didriksen and Heilbronner all concluded that the etiology of Claimant’s symptoms was toxic exposure during the Gulf War. For reasons previously stated, I accept the opinions of Drs. Rea, Didriksen and Heilbronner. Consequently, Claimant has sufficiently established that his exposure to chemicals while employed in the Persian Gulf is causally connected to his current condition of a chronic multi-system illness. Employer is therefore liable for all medical expenses determined to be both reasonable and necessary.

Dr. Rea testified that Claimant's physical symptoms could improve with treatment. Dr. Didriksen recommended a re-evaluation in 12 to 18 months, as well as a formal neurocognitive rehabilitation program and therapy. I find that these treatments are both reasonable and necessary, and as such, Employer is liable for those expenses, as well as for the appointment costs associated with Claimant's visits to Drs. Rea, Didriksen, Heilbronner and Lopez. Employer is likewise liable for all future reasonable and necessary medical expenses resulting from Claimant's chronic multi-system illness.

#### Section 14 (e) Penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer was advised of the injury on May 24, 1996 and filed a notice of controversion on October 30, 1996, clearly more than 14 days after learning of the injury. Claimant is owed 14(e) penalties, the exact amount to be calculated by the District Director.

#### **ORDER**

It is hereby **ORDERED** that:

1. Employer/Carrier shall pay to Claimant temporary total disability compensation from August 20, 1996 and continuing, based on an average weekly wage of \$560.61;
2. Pursuant to Section 7 of the Act, Employer/Carrier are responsible for the expenses associated with Drs. Rea and Didriksen's treatments, as well as all other reasonable and necessary medical expenses Claimant might so incur, regarding this work-related condition;
3. Pursuant to Section 14(e) of the Act, Employer shall be assessed penalties on all compensation not timely paid, the exact amount to be calculated by the District Director as heretofore set out;

4. Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

5. Counsel for Claimant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. *See* 20 C.F.R. § 702.132.

6. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 22<sup>nd</sup> day of March, 2001 at Metairie, Louisiana.

**A**

**C. RICHARD AVERY**  
Administrative Law Judge

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